U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32432667

Date: AUG. 14, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a video game production business, seeks to classy the Beneficiary, an environment concept art lead, as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner did not satisfy at least three of the initial evidentiary criteria. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability if:

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of achievements in the field through a one-time achievement (that is, a major, internationally recognized award) or qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

Because the Petitioner has not indicated or established the Beneficiary has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director concluded the Beneficiary fulfilled only one – leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii). On appeal, the Petitioner maintains the Beneficiary's qualification for five further criteria, including two additional criteria through the submission of comparable evidence. Issues and prior eligibility claims not raised on appeal are waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). For the reasons discussed below, the Petitioner did not demonstrate the Beneficiary meets at least three categories of evidence.

A. Evidentiary Criteria

> *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 204.5(h)(3)(i).

The Petitioner states that it "submitted evidence of the awards bestowed on the video games to which [the Beneficiary] contributed in a critical and essential capacity" and "did not provide evidence of awards that were received by [the Beneficiary] individually." In addition, the Petitioner argues the *USCIS Policy Manual* applies "a much stringent interpretation," indicating that "[t]he description of this type of evidence in the regulation indicates that the focus should be on the person's receipt of the awards or prizes, as opposed to the employer's receipt of the awards or prizes."[1]

[1] *See generally* 6 USCIS Policy Manual F.2(B)(1), https://www.uscis.gov/policymanual.

We do not concur with the Petitioner's argument. In determining eligibility for this criterion, we look to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), requiring "[d]ocumentation of the alien's receipt" of prizes or awards. Prizes or awards not received by or bestowed upon the Beneficiary do not meet this regulatory criterion. In addition, we consider the term "alien's receipt" using its ordinary, common meaning. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . ."). Thus, the *USCIS Policy Manual's* guidance is consistent with the regulation in instructing that the focus should be on the person's receipt of awards or prizes rather than on the employer's receipt of awards or prizes. Moreover, notwithstanding the Petitioner's own admission that the Beneficiary never individually received awards, the record does not contain evidence reflecting the awarding entities specifically naming or acknowledging the Beneficiary as an award recipient.

Furthermore, the Petitioner asserts that video games "are not recognized through awards to individual contributors, such as to individual Visual Effects Artists, Animators, etc., but instead through awards issued to the video game project as a whole – it is ensemble work and not solo work." However, the record does not fully support the Petitioner's assertions of only awarding ensemble work rather than solo work. The Petitioner's evidence reflects numerous named nominees for various awards. For example, for the video game [redacted] the British Academy of Film and Television Arts named 3 individuals for the 2020 "Best Narrative" category and the Motion Picture Sound Editors named 23 individuals for the 2021 "Outstanding Achievements in Sound Editing – Computer Cinematic" category and 19 individuals for the 2021 "Outstanding Achievement in Sound Editing – Computer Interactive Game Play" category. In addition, individuals were named in "Art Direction, Fantasy," "Direction in a Game Cinema," and "Game, Franchise Action" categories for the 2020 National Academy of Video Game Trade Reviewers.

Because the Petitioner did not show the Beneficiary received any prizes or awards, we need not determine whether the prizes or awards are nationally or internationally recognized for excellence in the field.

Accordingly, the Petitioner did not establish the Beneficiary fulfills this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

This regulatory criterion requires published material about the individual, relating to work in the field, in professional or major trade publications or other major media.[2] The Petitioner claims the Beneficiary's eligibility for this criterion based on digital material from kotaku.com, pcgamer.com, dexerto.com, and vgr.com and hardcover material from [redacted]

[2] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).

At initial filing, in response to the Director's request for evidence (RFE), and on appeal, the Petitioner made the same assertions about each of these publications without submitting any evidence to corroborate its claims. For instance, the Petitioner claims that "Kotaku.com is ranked 585 in the US and 2,070 in the world out of approximately 30 million websites," "PCGamer.com is ranked 593 in the US and 1,233 in the world out of approximately 30 million websites," "Dexerto.com is ranked 2,103 in the US and 5,548 in the world out of approximately 30 million websites," and "VGR.com is ranked 29,011 in the US and 80,397 in the world out of approximately 30 million websites."

In evaluating whether a submitted publication is a professional publication, major trade publication, or major media, relevant factors include the intended audience (for professional and major trade publications) and the relative circulation, readership, or viewership (for major trade publications and other major media).[3] Because the Petitioner did not provide evidence to support its assertions or include any other evidence relating to the standing or status of any of the publications, the Petitioner did not demonstrate that any of these digital or hardcover publications constitute professional or major trade publications or other major media.[4] Therefore, we need not address the Petitioner's arguments relating to whether the evidence qualifies as published material about the Beneficiary relating to his work in the field.

Accordingly, the Petitioner did not show the Beneficiary satisfies this criterion.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. 204.5(h)(3)(iv).

USCIS determines whether the person has acted as the judge of the work of others in the same or an allied field of specification.[5] The petitioner must show that the person has not only been invited to judge the work of others, but also that the person actually participated in the judging of the work of others in the same or allied field of specialization.[6] For example, a petitioner might document the person's peer review work by submitting a copy of a request from a journal to the person to do the review, accompanied by evidence confirming that the person actually completed the review.[7]

The Petitioner claims the Beneficiary's eligibility for this criterion based on him having "been invited to deliver master classes at the [redacted] Initially, the Petitioner provided a letter from G-A-, chair of entertainment design at [redacted] who stated that the Beneficiary "has been invited to give master classes and critiques as well as other presentations at [redacted]" The letter, however, does not demonstrate that the Beneficiary actually participated in the judging of the work of others rather than being invited to give master classes and critiques. Moreover, the Petitioner did not show how the letter establishes that giving master classes and critiques involves serving as a

[3] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).
[4] We note that the screenshots from vgr.com contain an "About" page indicating the mission and a "Meet Our Staff" section. However, the Petitioner did not establish how the information demonstrates professional or major trade publication or other major medium standing of the website.
[5] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).
[6] *Id.*
[7] *Id.*

judge of the work of others, consistent with this regulatory criterion. Furthermore, the letter does not elaborate and indicates who, when, and what the Beneficiary purportedly judged.

Similarly, in response to the Director's RFE, the Petitioner submitted a letter from T-B-, acting chair and director of the entertainment design department at [redacted] who stated that the Beneficiary "has been invited on numerous occasions to share his wealth of knowledge and expertise with our students" and "[e]ach interaction has been marked by [the Beneficiary's] dedication to imparting practical knowledge and preparing students for success in their future careers." Moreover, T-B- indicated:

> In the Entertainment Design Graduation class, [the Beneficiary] provided invaluable industry advice, portfolio suggestions, and professional critiques on concept art . . . .
>
> In the 3D Fundamentals class, [the Beneficiary] showcased his ability to translate 2D images into 3D sculptures while emphasizing the practical applications of these fundamentals in the context of concept art . . . .
>
> Furthermore, in the Design Process class, [the Beneficiary's] presentation provided a crucial introduction for our first-term students to the world of design in video games. His guidance on the design process, coupled with personalized assistance during the final assignment reviews, demonstrated his commitment to fostering the growth and development of emerging talent.

Again, the Petitioner did not show how T-B-'s letter demonstrates the Beneficiary's participation as a judge of the work of others. Instead, the letter indicates that the Beneficiary provided advice, suggestions, and critiques, showcased his work, and made presentations. Further, the letter does not describe how any of the Beneficiary's actions involved participating as a judge of the work of others, including who, when, and what the Beneficiary purportedly judged.

Without evidence reflecting the Beneficiary's participation as a judge of the work of others, including specific, detailed information, the Petitioner did not demonstrate the Beneficiary meets this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

USCIS determines whether the person's salary or remuneration is high relative to the compensation paid to others working in the field.[8] According to Form I-140, Immigrant Petition for Alien Workers, the Petitioner indicated the Beneficiary's job title as "Environment Concept Art Lead." In the initial cover letter, the Petitioner described the Beneficiary's job:[9]

> [The Petitioner] has selected [the Beneficiary] to work closely with our Art Director and Lead World Artist to conceptualize visual components and review the design and development of visual assets for [the Petitioner's] upcoming original next-generation AAA title. In this role, [the Beneficiary] will play a critical role in our productions,

[8] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).
[9] The initial cover letter repeats the letter from R-E-, game director and co-founder for the Petitioner.

> and in the success of our company as a whole. [The Beneficiary] will work closely with external teams around the world to give art feedback and direction for worlds being developed. He will drive the visual department of all internal worlds and maps, including Bluesky development, tasking the teams concept artist and external outsourcing artists. He will be critical to keep the production of [the Petitioner] in line with the strict art direction by creating thorough style guides and art guides for all external SIE partners and internal [Petitioner] art teams. He will be responsible for building and managing a strong AAA level concept art team and outsourcing artists.

The Petitioner also provided paystubs indicating the Beneficiary earns approximately $82/hour or $171,000/year. As comparative evidence, the Petitioner submitted screenshots from flcdatacenter.com for "Special Effects Artists and Animators" with the following description: "[c]reate special effects or animations using film, video, computers or other electronic tools and media for use in products, such as computer games, movies, music videos, and commercials." In addition, the Petitioner offered salary information from glassdoor.com and salary.com for "Concept Artists."

However, the Petitioner did not offer comparable salary evidence pertaining to the Beneficiary's specific occupation as an "Environment Concept Art Lead." Specifically, the Beneficiary's position of a "Lead" suggests a higher job classification than an environment concept artist. Furthermore, the Petitioner's own job description contains further job duties and responsibilities than a special effects artist or animator or concept artist, justifying a more leading position. Thus, in order to meet this criterion, the Petitioner must show that the Beneficiary received a high salary in relation to other environment concept art leads rather than other special effects artists or animators or concept artists. Both precedent and case law support this application of 8 C.F.R. § 204.5(h)(3)(ix). *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Because the Petitioner did not provide sufficient evidence demonstrating the salaries of other environment concept art leads, the Petitioner did not establish the Beneficiary commands a high salary in relation to others in his field.

Accordingly, the Petitioner did not demonstrate the Beneficiary meets this criterion.

B. Comparable Evidence

In both the RFE response and on appeal, the Petitioner requests the Beneficiary's eligibility be considered through comparable evidence and references regulations and policy relating to the O-1 nonimmigrant classification. For instance, in the RFE response, the Petitioner requested the Beneficiary's documentation be considered comparable as a "record of major commercial or critically acclaimed successes, as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings" and "[e]vidence that beneficiary has received significant recognition for achievements from organizations, critics, government agencies or other recognized experts in the field in which the beneficiary is engaged." However, these regulations fall

under the requirements for O-1 nonimmigrants in the arts or motion picture or television industry – 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) and (5) or 8 C.F.R. § 214.2(o)(3)(v)(B)(4) and (5), respectively.[10] On appeal, the Petitioner references a draft memorandum in the adjudication of O-1 nonimmigrants.

Although the regulations for several immigrant and nonimmigrant classifications allow for the consideration of comparable evidence, we will not consider how regulation or policy relates to another immigrant or nonimmigrant category. Rather, we will apply the comparable evidence requirements and policy as they relate to the immigrant classification for individuals of extraordinary ability under 8 C.F.R. § 204.5(h)(3).[11]

This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the person's eligibility, if it is determined that the evidentiary criteria described in the regulations do not readily apply to the person's occupation.[12] When evaluating such comparable evidence, officers must consider whether the regulatory criteria are readily applicable to the person's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.[13]

On appeal, the Petitioner claims:

> . . . At least two of the criteria are not readily applicable to [the Beneficiary's] occupation and field of expertise, which include the criterion for "display of the alien's work in the field at artistic exhibitions or showcases," which is reserved for traditional artists showcasing their work in exhibitions, and the criterion "commercial successes in the performing arts," which typically only applies to performing artists. With respect to the latter criterion, the Service acknowledges in its decision that "[g]iven the very specific language at 8 C.F.R. 204.5(h)(3)(x), we are not persuaded that this criterion can apply to any field other than the performing arts." We therefore respectfully submit that the Service misapplied its own law and policy in wholly disregarding the evidence that [the Petitioner] submitted as other comparable evidence.

Although the Petitioner indicates two criteria to apply comparable evidence, the Petitioner does not identify what evidence should be considered and how it is comparable to the regulatory criteria for the immigrant classification as an individual of extraordinary ability. The burden remains with the Petitioner to establish eligibility for the benefit sought. *Chawathe*, 25 I&N Dec. at 375-76. We note that the Petitioner's RFE response, referencing O-1 nonimmigrant regulatory criteria, discussed evidence claiming the impact of his contributions with video games and acknowledgement for achievements in the field by others relate more to the original contributions criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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[10] The provisions for comparable evidence for O-1 nonimmigrants under these categories fall within C.F.R. § 214.2(o)(3)(iv)(C) or 8 C.F.R. § 214.2(o)(3)(v)(C), respectively.
[11] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).
[12] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).
[13] *Id.*

Without identifying such evidence and explaining how the documentation is comparable to the respective regulatory criteria, the Petitioner did not demonstrate the Beneficiary's eligibility for additional criteria through the submission of comparable evidence.

C. O-1 Nonimmigrant Status

We note that the record reflects that the Beneficiary received O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved O-1 nonimmigrant visa petitions filed on behalf of the Beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard – statute, regulations, and case law. Many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Furthermore, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).[14]

III. CONCLUSION

The Petitioner did not establish the Beneficiary satisfies any additional categories of evidence, including through the submission of comparable evidence. Although the Petitioner also argues the Beneficiary's eligibility for the original contributions criterion under 8 C.F.R. § 204.5(h)(3)(v), we need not reach this additional ground because the Beneficiary cannot fulfill the initial evidentiary requirement of three under 8 C.F.R. § 204.5(h)(3). Further, we need not review the Director's favorable determination for the leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii), as well as provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Accordingly, we reserve these issues.[15]

Nevertheless, we have reviewed the record in the aggregate, concluding it does not support a conclusion that the Beneficiary has established the acclaim and recognition required for the classification sought. The Petitioner seeks a highly restrictive visa classification for the Beneficiary, intended for individuals already at the top of their respective fields, rather than those progressing toward the top. *Price*, 20 I&N Dec. at 954 (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021), *aff'd*, 2023 WL 1156801 (D.C. Cir. Jan. 31, 2023) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No.

[14] *See also generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(3).

[15] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where applicants do not otherwise meet their burden of proof).

19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball coach). Here, the Petitioner has not shown the significance of the Beneficiary's work is indicative of the required sustained national or international acclaim or it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate the Beneficiary has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The record does not contain sufficient evidence establishing the Beneficiary among the upper echelon in his field.

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.